U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF U-C- INC.

DATE: MAY 19, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a technology solutions and services company, seeks classification for the Beneficiary as an individual of exceptional ability in the sciences. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This second preference classification makes immigrant visas available to foreign nationals with a degree of expertise significantly above that normally encountered in the sciences, arts, or business.

The Director, Texas Service Center, denied the petition, finding that the Petitioner did not establish 1) that the Beneficiary possesses exceptional ability, 2) that the position for which the Beneficiary's services are sought requires an individual of exceptional ability, and 3) that the Beneficiary meets the terms of the submitted ETA Form 9089, Application for Permanent Employment Certification (labor certification).

The matter is now before us on appeal. The Petitioner submits additional evidence in support of its appeal and states that the Director erred in his conclusions regarding each of the three grounds for denial listed above.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b)(2) of the Act provides classification to qualified individuals who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States. The implementing regulation at 8 C.F.R. § 204.5(k)(2) states: "Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business."

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) provides that, to establish exceptional ability in the sciences, arts, or business, a petitioner must submit at least three of the following:

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If a petitioner submits sufficient initial evidence, we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality"); *see also Kazarian v. USCIS*, 596 F.3d 1115, 1119-20 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination).

In addition to demonstrating a beneficiary's exceptional ability, a petitioner must also show that the intended position requires an individual of exceptional ability. 8 C.F.R. 204.5(k)(4)(i).

II. ANALYSIS

The Petitioner seeks to employ the Beneficiary as a technical consultant. The Director found the Petitioner did not establish eligibility because it did not demonstrate that the Beneficiary has exceptional ability, that his intended position requires an individual of exceptional ability, and that the Beneficiary meets the terms of the labor certification provided. Upon *de novo* review, we agree that the Petitioner has not established eligibility for the benefit sought. Although we find that the Beneficiary meets the terms of the labor certification, the record does not show that he possesses exceptional ability or that his intended position requires an individual of exceptional ability.

[1] is a series of software applications sold by

A. Exceptional Ability

1. Initial Evidence

The Petitioner has indicated that it meets the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), and (F). We will therefore evaluate the material provided under these criteria below.

> *An official academic record showing that the beneficiary has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.*

The Director found the Petitioner satisfied this criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A). The Petitioner provided a copy of a diploma from India, indicating that the Beneficiary received a Bachelor of Science degree in mathematics, physics, and electronics on July 29, 1998. An Academic Equivalency Evaluation regarding this degree stated that it requires a three-year course of study and that it is the educational equivalent of an associate degree in the United States. Based on this documentation, we agree that the Petitioner has met this criterion.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the beneficiary has at least 10 years of full-time experience in the occupation for which he or she is being sought.*

The Director determined that the Petitioner did not satisfy this criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B), finding that the letters submitted are not from former employers and do not show 10 years of full-time experience in the relevant occupation. The Director also stated that the letters contradict another Form I-140 previously filed on behalf of the Beneficiary.[2] On appeal, the Petitioner cites to the same letters, as well as newly submitted payroll records as evidence of the Beneficiary's past employment. The Petitioner also disputes the Director's characterization of the materials provided as inconsistent with previously submitted petitions. Upon review, we find the Petitioner has not submitted sufficient credible documentation to satisfy this criterion.

As stated previously, the title of the Beneficiary's intended job is technical consultant. On the labor certification submitted, the Petitioner classifies this position as within the occupation of "Software Developers, Applications," Occupational Information Network (O*NET) code 15-1132. According to O*NET, an individual in this occupation designs, develops, and modifies software and software systems. The Petitioner contends on appeal the Beneficiary has the necessary 10 years of experience in this occupation through his work in the following positions:

[2] In accordance with 8 C.F.R. § 103.2(b)(16)(i), the Director issued a notice of intent to deny the petition that advised the Petitioner of the perceived inconsistencies with the previous filing, and provided the Petitioner an opportunity to respond before rendering a final decision.

- 1/2/2012-7/1/2015:[3] developer for Petitioner
- 5/30/2010-12/30/2011: consulting technical manager for
- 6/18/2007-5/30/2010: senior support analyst for
- 3/25/2002-6/15/2007: technical support analyst for
- 3/8/1999-3/15/2002: computer software professional for

In assessing this work history, the Director stated that "the beneficiary cannot satisfy this requirement simply because he worked in different jobs in the broader occupation of Software Development." The Director then found that the submitted letters do not establish the Beneficiary's prior experience as a technical consultant. We note that the plain language of this criterion requires 10 years of experience in the "occupation" for which the Beneficiary is being sought. Therefore, regardless of the Beneficiary's prospective job title, the relevant question is whether the Petitioner has provided letters from former employers of the Beneficiary showing that he has at least 10 years of experience in the occupation of "Software Developers, Applications."

In order to determine whether employment falls within a certain occupation, we look to a description of the position's duties or responsibilities. Regarding its employment of the Beneficiary as a developer from 2012 to 2015, the Petitioner provided a letter from its president, Among other duties, noted the Beneficiary's role in analyzing user requirements, procedures, and problems to automate or improve existing systems, as well as developing, creating, and modifying general applications software or specialized utility programs. When considered with the totality of the evidence in the record, we find this to be sufficient evidence that the Beneficiary's experience with the Petitioner is employment in the necessary occupation. As explained in the paragraphs that follow, however, the Petitioner has not demonstrated sufficient other experience in the relevant occupation to meet the 10 years necessary for this criterion.

The Petitioner indicated that from 2002 to 2011, the Beneficiary worked for In support of this experience, the Petitioner provided two letters from technical account manager at dated April 28, 2015, and August 24, 2015. The Director found that the letters from were not probative because, *inter alia*, they were inconsistent with other materials filed on the Beneficiary's behalf. The Director also stated that these letters were not from the Beneficiary's previous employer, as required by this criterion, because the Beneficiary was employed by not The Petitioner submitted documentation showing that both companies are subsidiaries of As a parent corporation could have access to the human resources information of its subsidiaries, we find that a letter from could meet this criterion.

In this case, however, the Petitioner did not show that is an individual with sufficient knowledge to speak credibly about the Beneficiary's employment history with According to the address on the letterhead, works at field office in New York.

[3] Because the Petitioner must demonstrate the Beneficiary's eligibility at the time of filing, we consider employment only up until the date of filing, July 1, 2015.

headquarters is in California, and the Beneficiary worked for the subsidiary companies at locations in Australia and New Jersey. did not reference any period during which he and the Beneficiary worked together. We also note that title of technical account manager does not indicate that he is otherwise privy to employment information regarding employees, and he did not describe the basis of his knowledge. As a result, the Petitioner has not demonstrated that is a reliable source of information regarding the Beneficiary's employment dates, job titles, and job duties.

In addition, as referenced by the Director, the letters from are not consistent with information previously submitted on the Beneficiary's behalf in connection with other petitions. states that, from June 18, 2007, to May 30, 2010, the Beneficiary worked for as a principal support analyst, a position which the Petitioner contends is in in the occupation of "Software Developers, Applications," O*NET code 15-1132. However, according to a labor certification filed by in conjunction with a previously approved Form I-140, the Beneficiary's title during the same time period was computer support specialist/tech support, and was in the occupation of "Computer Support Specialties," O*NET code 15-1041. This other filing therefore explicitly indicated that he was not working in the relevant occupation from June 18, 2007, to May 30, 2010.

In response to the Director's statements regarding a lack of corroboration for the employment claimed in letters, the Petitioner provided a 2005 and a 2008 payment summary issued to the Beneficiary from The 2005 statement indicates that payments totaling $6433 were made to the Beneficiary from June 1, 2005, to June 30, 2005. The 2008 statement shows that payments totaling $5589 were made to the Beneficiary from June 15, 2007, to July 1, 2007.[4] Taken together, the submitted payment summaries only corroborate a month and a half of the stated employment. In addition, the payment summaries do not provide information regarding the occupation in which the Beneficiary worked. As a result, these documents offer limited support for letters.

Moreover, even if we were to consider letters as credible evidence of the Beneficiary's work experience, the job duties he listed for the period from June 18, 2007, to May 30, 2010, do not appear to fall within the occupation of "Software Design, Applications." According to the Beneficiary's work during this time involved the resolution of technical issues with and other applications. His responsibilities required him to "[a]cquire and maintain an up-to-date and in-depth knowledge of applications, tools, product support, and consulting policies in order to provide technically accurate solutions to customers and publish these solutions on website." Similarly, the previous labor certification states that, as a computer support specialist, the Beneficiary had to "provide technical assistance to computer system users by identifying, analyzing, and resolving complex, critical technical problems related to applications." Both descriptions of the Beneficiary's tasks indicate that he functioned primarily in the role of technical

[4] The summary states that the period during which payments were made was "01/07/07 to 15/06/07." The second date, which occurred before the first, appears to be an error.

support to those having issues with software. These duties are consistent with the occupation of "Computer Support Specialties," O*NET code 15-1041, as listed on the previous labor certification. O*NET indicates that an individual working in that occupation oversees the daily performance of computer systems and performs duties such as resolving technical issues, recommending and installing updates and improvements, and modifying and customizing commercial programs for internal needs.[5]

Similarly, the descriptions of the Beneficiary's work from March 25, 2002, to June 17, 2007, indicate that the Beneficiary's experience during this time was as a computer support specialist, and not as a software designer. indicated that the Beneficiary worked as a technical support analyst during this period. The duties he describes for this position are substantially similar to those he listed for the position of principal support analyst, discussed above. The previous labor certification indicated that the Beneficiary worked as a senior support analyst at from March 25, 2002, to June 15, 2007, and that his job duties were varied, but included "primary phone support, problem tracking, diagnosis, replication, troubleshooting, and resolution of complex critical cases." As noted by the Director, this description is reinforced by a letter from the Beneficiary's supervisor at who stated that the Beneficiary "gained and demonstrated extensive knowledge and experience in providing technical assistance on enterprises." These descriptions indicate that the Beneficiary's duties from 2002 to 2007 were mainly focused on technical support rather than software development.

Based on the above, including the general issues regarding the reliability of knowledge and the descriptions of the Beneficiary's duties provided in both his letter and in the previous labor certification filed by we find that the record does not demonstrate that the Beneficiary worked in the relevant occupation during the years 2002 to 2010.

The Petitioner further indicated that the Beneficiary worked as a computer software professional for from March 8, 1999, to March 15, 2002. In support of his experience in this position, the Petitioner provided two notarized affidavits from former coworkers of the Beneficiary, attesting to his employment and job duties. The Petitioner also provided a notarized affidavit from the Beneficiary stating that is no longer in existence. In the denial, the Director stated that these affidavits did not sufficiently demonstrate the unavailability of a letter from the former employer. On appeal, the Petitioner submits additional evidence in the form of a print-out from the Australian Business Registrar indicating that the business registration for was cancelled on December 31, 2002. Upon inspection, this company could not have been the Beneficiary's employer from 1999 to 2002, as the historical details tab shows the entity was formed in 2002 and its registration was cancelled that same year. A search of related names indicates, however, that was in existence during the Beneficiary's stated

[5] O*NET advises that this code is no longer in use, and that the corresponding code is Computer User Support Specialists, code 15-1151. *See* O*NET Online, http://www.onetonline.org/find/quick?s=15-1041 (last visited May 11, 2016). The tasks listed are for the current code 15-1151.

dates of employment and cancelled its business registration on June 30, 2006.[6] When considered in the totality, the evidence in the record establishes the unavailability of a letter from [redacted] As a result, we accept the two affidavits from the Beneficiary's former coworkers as supporting evidence.

Upon consideration of the contents of the affidavits in conjunction with other evidence in the record, we do not find that this experience was in the relevant occupation. Both affidavits indicate that the Beneficiary worked as a [redacted] developer. However, the Beneficiary's previous labor certification indicates that he worked as a [redacted] technical consultant and "[r]endered [redacted] product related technical services for implementation, upgrades and post production maintenance." While the affidavits suggest the Beneficiary was employed in the occupation of software developer, the labor certification indicates that his role was in fact closer to that of a technical support provider in the occupation of computer user support specialist. As a result, the Petitioner has not provided sufficient credible evidence to demonstrate that his work at [redacted] qualifies as experience working in the occupation of Software Development.

In summary, the Petitioner has not submitted sufficient credible evidence in the form of letters from former employers to establish that the Beneficiary has 10 years of experience in the intended occupation.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

In support of the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), the Petitioner contends that the Beneficiary has been recognized for significant contributions during his work for the Petitioner as a contractor for [redacted] Specifically, the Petitioner states in its appeal brief that the Beneficiary developed technology solutions that "help[ed] [redacted] generate $90 million in savings per year as a result of taking over the administration of the Social Security Income (SSI) State Supplement Program."

The Petitioner provided reference letters from several employees of [redacted] These individuals discuss software solutions developed by the Beneficiary for [redacted] applications, including the State Supplement Program. With regard to this program, [redacted] senior [redacted] programmer/analyst, explained that [redacted] needed to load a large amount of payments in a stipulated window of time, and that this requirement far exceeded the capacity of the existing [redacted] system. He stated that while [redacted] recommended that [redacted] purchase new hardware for the program, the Beneficiary led a team that was able to use existing hardware and [redacted] technology to accomplish the required task. [redacted] assistant director of solution services stated in reference to that project that "[i]n over twenty years in this business, I have not seen a greater technical challenge or project with as great a financial impact." He further stated that the

[6] A copy of the registration details of the appropriate entity has been printed and incorporated into the record.

Beneficiary's work "has enabled the state to take full advantage of prior investments in our ."

Regarding the Petitioner's contention that the Beneficiary's software solution generated $90 million in savings for State, the record does not support such a finding. Initial evidence submitted with the Form I-140 included a printout from the website of the Office of Temporary and Disability Assistance (OTDA) regarding changes to the way SSI is distributed to recipients. The printout did not mention the Beneficiary or his software solution, but quoted OTDA's commissioner as stating that "[t]he State expects to save approximately $90 million annually by taking over the administration of the SSI State Supplement Program from the Federal Government." The submitted letters indicate that the Beneficiary's work allowed the state to accomplish this project using its existing framework. Accordingly, the appropriate savings attributable to his work would be the difference between the cost of his solution and the cost of acquiring another mechanism for assuming administration of the program, rather than the entire savings generated by the program itself.

In addition, although it is clear that these employees respect the Beneficiary's abilities and knowledge with neither they nor the Petitioner indicate that the Beneficiary's efforts have impacted the field of software development. Such contributions must typically have an impact in the field beyond an individual's colleagues or clients. We acknowledge the larger scale for impact when dealing with a governmental entity as a client. The size of the client does not, however, indicate an achievement or contribution that affects the field of software development or a related industry. In this case, the Petitioner has not provided documentation showing that the Beneficiary's work has been replicated or noticed by others involved in software development. Without more, the esteem of coworkers does not demonstrate that his work constitutes a significant contribution to the industry or field.

The Petitioner also provided a letter from professor at indicated that he has reviewed the documents pertaining to the Beneficiary's eligibility and expressed his opinion that he qualifies for the benefit sought. He stated he was impressed by the range of technologies with which the Beneficiary has experience and concluded that he must have been a valuable asset to employers. We note that impressions of the Beneficiary are based solely on a review of materials presented to him for purposes of writing the reference letter. He does not articulate how the Beneficiary's work constitutes an achievement or significant contribution to the field or industry. The Petitioner cannot meet this criterion by showing that the Beneficiary's work had a positive impact on his employer or employer's clients. Moreover, while we consider opinion of the Beneficiary's abilities as they relate to the field, we are responsible for the evaluation of whether the Beneficiary meets the legal requirements of the benefit sought. We may, in our discretion, use submitted statements from experts as advisory opinions. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we are ultimately responsible for making the final determination regarding an individual's eligibility for the benefit sought. *Id.*

After reviewing the submitted reference letters and other evidence in the record, we find the Petitioner has not provided sufficient credible evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. As a result, it has not met this criterion.

2. Conclusion

As discussed above, the Petitioner has not satisfied at least three evidentiary criteria as required under the regulations. Had the Petitioner done so, the next step would be a final merits determination that considers all of the filings in the context of whether or not the Petitioner has demonstrated "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2); *see also Kazarian*, 596 F.3d at 1119-20. Although we need not provide the type of final merits determination referenced in *Kazarian*, a review of the record in the aggregate supports a finding that the Petitioner has not established that the Beneficiary possesses the level of expertise required for the classification sought.

B. Position Requiring Exceptional Ability

The Director found that the Petitioner did not establish that the proffered position was one that required an individual of exceptional ability. The Director based this finding on the education and experience requirements, as well as the job duties listed on the labor certification. On appeal, the Petitioner recites the job duties and states that, according to Department of Labor regulations, the job duties listed must "bear a reasonable relationship to the occupation in the context of the employer's business." 20 C.F.R. § 656.17(h). We acknowledge this regulation as describing a requirement for obtaining a labor certification. The relevant regulation governing this visa classification, however, states that the job must necessitate an individual of exceptional ability. 8 C.F.R. 204.5(k)(4)(i). Thus, the regulation cited by the Petitioner is not relevant for analyzing this particular requirement of the benefit sought.

In this case, the Petitioner has not demonstrated that the position for which the Beneficiary's services are sought requires an individual with a degree of expertise significantly above that normally encountered in the field. According to the labor certification submitted with this petition, the position of [redacted] technical consultant requires an individual with an associate degree in computer science, engineering, business or a related field. The labor certification further states that the wage offered for the position is $122,179.00, exactly the prevailing wage for the position's occupation and skill level. Lastly, the Petitioner indicated that no experience in the job offered is required for the job, and that it will accept 60 months of experience in an alternate occupation, specifically that of a computer software professional.

When considered in light of the relevant regulations, it does not appear that the position in which the Petitioner seeks to employ the Beneficiary requires an individual of exceptional ability. As discussed previously, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) provides a list of initial evidentiary criteria to demonstrate the Beneficiary's eligibility for this classification. The Petitioner correctly

states on appeal that these criteria are not specific requirements for the prospective position under the regulations. However, as these criteria are the factors deemed to reflect exceptional ability, we find them relevant considerations in evaluating whether a position requires an individual of exceptional ability.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D) indicates that one marker of exceptional ability may be the receipt of salary or remuneration significantly above others in the field. However, as noted in the previous paragraph, the Petitioner stated that the offered wage for this position is exactly the prevailing wage for the position's occupation and level. In addition, while 8 C.F.R. § 204.5(k)(3)(ii)(B) states that 10 years of experience in the occupation for which the beneficiary's employment is sought may denote exceptional ability, the position in which the Petitioner seeks to hire the Beneficiary does not require any experience in the relevant occupation. Lastly, according to 8 C.F.R. § 204.5(k)(3)(ii)(A), a degree in a relevant field may support a finding of exceptional ability. According to the labor certification, the position in which the Petitioner seeks to employ the Beneficiary requires an associate degree in computer science, engineering, business, or a related field. The print-out from O*NET regarding the relevant occupation provides that "[m]ost of these occupations require a four-year bachelor's degree, but some do not." Although O*NET shows that the average position in this occupation requires a four-year degree, the labor certification for the Beneficiary's position requires a three-year degree. This level of required education, which is lower than what is typically needed, does not support a finding that the position requires "a degree of expertise above that normally encountered." 8 C.F.R. § 204.5(k)(2). The Petitioner does not provide any other reasoning for a conclusion that its position of [redacted] requires an individual of exceptional ability. For these reasons, we find the Petitioner has not satisfied its burden of proof in meeting this portion of the regulatory requirements.

C. Qualification for the Offered Position

The Director also found that the Petitioner did not establish the Beneficiary's qualification for the offered position. To be considered qualified, the Beneficiary must meet the minimum requirements for the position, as stated on the labor certification. The Director stated that the position requires a minimum of 60 months experience as a computer software professional. The Director then concluded, based on the issues discussed above regarding the letters from the Beneficiary's former employers, that the Petitioner did not show he had the necessary 60 months of experience.

In addressing this prong of the dismissal, we refer to the above analysis regarding the Beneficiary's relevant years of experience. Although the provided letters do not demonstrate that the Beneficiary has 10 years of experience in the occupation in which the Petitioner seeks his employment, we find the record does establish that he worked for 60 months as a computer software professional. Corroborating evidence includes the previous labor certification cited throughout this decision. While the job titles listed on the Beneficiary's earlier petitions are varied, they all fall under the broad title of computer software professional. As a result, we find that the Beneficiary does possess the minimum qualifications stated in the labor certification, and we withdraw the Director's finding

on this issue. Nevertheless, for the reasons stated above, the Petitioner has not demonstrated that the Beneficiary qualifies for the benefit sought.

III. CONCLUSION

The Petitioner has not provided the requisite initial evidence to establish exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii). In addition, the Petitioner has not shown that the position for which the Beneficiary's services are sought requires an individual of exceptional ability. *See* 8 C.F.R. § 204.5(k)(4)(i).

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternate basis for the decision. In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of U-C- Inc.*, ID# 16428 (AAO May 19, 2016)